

ALERTS

Employment Update: New York State Governor Hochul Vetoes New York State Non-Compete Ban Bill

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On Dec. 22, 2023, New York State Governor Kathy Hochul vetoed a bill that would have prohibited all non-compete restrictions on New York-based employees (and certain service providers) and allowed them to recover civil damages from their employers who impermissibly imposed such restrictions. As discussed in more detail in our earlier *Alert*, if the bill had become law, New York would have been the fifth state to ban non-competes, joining California, North Dakota, Oklahoma and Minnesota (Minnesota being the last in 2023). Although New York's legislature could override Gov. Hochul's veto, it is considered highly unlikely – legislative veto overrides in New York are extremely rare.

Gov. Hochul vetoed the bill after intense negotiations between legislative leaders and the Governor to find a compromise to limit the bill's scope, such as imposing a non-compete ban on employees earning below a specified dollar threshold. The fact that neither side was willing to cede negotiation points suggests that the battle over non-competition legislation will continue into next year. In fact, the bill's sponsor has vowed to reintroduce the bill next year.

The veto of the 2023 bill should not lead to complacency. New York and other states may pass legislation limiting or prohibiting non-competes and similar restrictive covenants, increasingly courts are reviewing restrictive covenants more strictly and, as described in our *Alert*, the Federal Trade Commission is expected to take action to finalize its proposed federal non-compete prohibition in 2024.

In light of the current environment, we are recommending that employers, including alternative investment managers that require their partners and employees to agree to restrictive covenants, consider revisiting their approach to restrictive covenants. For example, employers should consider:

- Individually tailoring the terms of non-competition and non-solicitation restrictions based on an employee's (or other service-provider's) role and responsibilities and the employer's actual needs;
- Reviewing restrictive covenants for employees working remotely in other states, for compliance with applicable state laws;
- Bolstering contractual obligations and policies to protect intellectual property;
- Establishing deferred compensation and other arrangements that incentivize compliance with restrictive covenant obligations; and
- Adopting senior-level plans (commonly referred to as "top hat plans") that might sidestep any state (but not federal) limitations on non-competition and non-solicitation restrictions.

We will continue to monitor and advise you of federal and state law developments affecting non-competes and are available to discuss practical approaches to preemptively address them.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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